91-190

NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

EDWARD A. HEFFERNAN,

PETITIONER,

versus

OFFICE OF DISCIPLINARY COUNSEL,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWARD A. HEFFERNAN,

PETITIONER,

v.

OFFICE OF DISCIPLINARY COUNSEL,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF OHIO

Petitioner Edward A. Heffernan respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on April 3, 1991. Petitioner and Respondent were the only parties to that action.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the suspension of an attorney from the practice of law for an alleged breach of a disciplinary rule violates the attorney's right to due process when the suspension is based upon a charged violation which had been withdrawn prior to submission to the court.

2. Whether the suspension of an attorney from the practice of law based upon an interpretation of an ethical canon by the highest court of a state which differs significantly from interpretations of that canon applicable at the time of the occurrence of the alleged violation interferes with the attorney's right to due process.

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OPINIONS BELOW

On April 3, 1991, in Case Number 90-2090, the Supreme Court of Ohio accepted certain findings of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio contained within a report and recommendation filed October 26, 1990, but rejected the board's disciplinary recommendation and summarily suspended Petitioner from the practice of law in the State of Ohio for a six month period. A copy of the Supreme Court of Ohio's per curiam opinion, together with the dissenting opinion of Justice Douglas of the Supreme Court of Ohio, is attached as Appendix A.

The court denied Petitioner's Motion for Reconsideration without a hearing on April 25, 1991.

JURISDICITON

On April 3, 1991, the Supreme Court of Ohio executed an order suspending Petitioner from the practice of law for a period of six months pursuant to Section 7(c) of the Supreme Court Rules for the Government of the Bar of Ohio (Appendix B). On April 25, 1991, the court entered an order overruling Petitioner's Motion for Reconsideration (Appendix C).

The jurisdiction of the United States Supreme Court is invoked under the provisions of Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On February 4, 1985, Petitioner, an attorney at law then licensed to practice in the State of Ohio and various federal courts, appeared in the Shaker Heights (Ohio) Municipal Court on behalf of one Joseph Fresenda and entered a plea of no contest to a routine traffic violation. The municipal court judge accepted Fresenda's plea, found him guilty, and fined him $50.00 and costs.

On April 14, 1987, Joseph Fresenda filed a motion in the Shaker Heights Municipal Court to vacate the no contest plea based upon an assertion that it was actually his brother Phillip who was cited and found guilty of the traffic violation and that Phillip had held himself out to be Joseph to the citing officer and the court. Joseph Fresenda further alleged that Petitioner had known that Phillip Fresenda was not Joseph Fresenda in February of 1985.

On April 21, 1989, the Disciplinary Counsel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio filed a formal grievance against Petitioner alleging

that he had violated Disciplinary Rules 1-102(A)(3), 1-102(A)(4), 1-102(A)(5), 1-102(A)(6) 7-102(A)(3), 7-102(A)(7) and 7-102(B)(1) of the Code of Professional Responsibility as Adopted by the Supreme Court of Ohio on October 5, 1970. Petitioner answered the grievance and denied that he had violated any disciplinay rule.

On May 18, 1990, a hearing was scheduled before a panel consisting of three members of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio pursuant to Section 13 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio. Prior to commencement of the hearing, Disciplinary Counsel and Petitioner executed a document entitled "Stipulations - Admission - and Recommended Sanction" wherein it was stipulated, inter alia, that all charges and allegations against Petitioner were withdrawn with the exception of the charged violations of Disciplinary Rules 1-102(A)(5) and 1-102(A)(6)(Appendix D). Those rules pertain to

engagement of a lawyer in conduct prejudicial to the administration of justice and in other conduct that adversely reflects upon fitness to practice law. The matter then proceeded to hearing upon those specific violations.

At the hearing, the panel of commissioners received the stipulations of counsel and assured Petitioner that if it was determined by the panel that Petitioner was to be "placed in jeopardy with respect to another violation other than those stipulated, we will so notify you and you'll have an opportunity to reconvene the hearing and put on whatever testimony you wish."

On October 26, 1990, the Board of Commissioners issued findings of fact and conclusions of law, acknowledging that the only pending grievances against Petitioner were those remaining after execution of the stipulations. The Board of Commissioners accepted Petitioner's admission that he had violated Disciplinary Rules 1-102(A)(5) and 1-102(A)(6) and recommended that Petitioner be disciplined in the form of a public reprimand pursuant to Section 7(e) of Rule V of

the Rules for the Government of the Bar (Appendix E). Petitioner filed no objection to the final report of the Board of Commissioners and the findings of fact, conclusions of law, and recommendation thereafter came before the Supreme Court of Ohio for review pursuant to Section 22 of Rule V of the Rules for the Government of the Bar. No further hearing was scheduled before the Ohio Supreme Court since no objections had been filed.

On April 3, 1991, the Supreme Court of Ohio, in Case No. 90-2090, accepted the finding of the Board of Commissioners that Petitioner was unaware of the fraud perpetrated upon the Shaker Heights Municipal Court by the Fresenda brothers, but made an additional finding that the record indicated a violation of Disciplinary Rule 7-102(B)(1) (Appendix F). That rule concerns the duty of an attorney to report a fraud upon receipt of information clearly establishing that a client or a person other than a client has perpetrated a fraud upon another person or tribunal. The charge against Petitioner under

Rule 7-102(B)(1) had been specifically withdrawn by Disciplinary Counsel prior to submission to the Board of Commissioners and the Ohio Supreme Court. The court thereupon rejected the recommendation of the Board of Commissioners that Petitioner be publicly reprimanded. Two justices dissented. Concurrent with the majority opinion, the Supreme Court of Ohio issued an order suspending Petitioner from the practice of law for a period of six (6) months.

Petitioner filed a Motion for Stay of Imposition of Sentence on April 8, 1990 and a Motion for Reconsideration on April 9, 1990. Both motions were denied without a hearing on April 25, 1990 (Appendix G). Petitioner filed a Motion for Stay of Suspension Pending Filing and Ruling on Petition for Writ of Certiorari with the United States Supreme Court on April 30, 1990. That motion was denied without a hearing on May 15, 1990. This petition follows.

REASONS FOR GRANTING A WRIT OF CERTIORARI

The suspension of an attorney from the practice of law for an alleged breach of a disciplinary rule violates the attorney's right to due process when the suspension is based upon a charged violation which had been withdrawn prior to submission to the court.

This Court has previously determined that the act of disbarring or suspending an attorney is a punishment or penalty imposed upon a lawyer. Ex parte Garland, 4 Wall. 333, 380; Spevack v. Klein, 385 U.S. 511, 515. Because of the potential for punishment and/or penalty, an attorney who is the subject of a grievance or disciplinary proceeding is entitled to procedural due process, including fair notice of the relevant charge and an opportunity to be heard. In re Ruffalo, 390 U.S. 544, 550.

In the case below, Petitioner received notice of charges against him in the form of a formal grievance filed by the Disciplinary Counsel of the Board of Commissioners on Grievances and

Discipline of the Supreme Court of Ohio. Petitioner denied the allegations set forth in the grievance and prepared his defense based upon the charges specifically set forth in the accusing document. Pursuant to the rules promulgated by the Supreme Court of Ohio to govern disciplinary proceedings within the state, Petitioner was entitled to a full hearing upon the grievance before a panel of the Board of Commissioners and further was entitled to file objections to any report and recommendation issued by the Board of Commissioners and to a hearing upon any objections before the Supreme Court of Ohio.

Prior to full hearing, Petitioner and Disciplinary Counsel entered into a set of stipulations wherein he agreed to forfeit his right to a hearing on the merits of the charged violations and admit to a violation of Disciplinary Rules 1-102(A)(5) and 1-102(A)(6) in exchange for withdrawal of all other pending charges and a recommendation from Disciplinary Counsel that he be penalized in the form of a

public reprimand. The hearing before the panel was thus limited to a presentation of evidence by Petitioner on the issue of an appropriate penalty. Petitioner presented no evidence at the hearing to refute the charges against him because he admitted violating the two stipulated rules and because all other charges had been withdrawn. Petitioner was affirmatively assured by the chairman of the panel, on the record, that he would be afforded the opportunity for a reconvened hearing if the board determined that Petitioner's conduct constituted a violation of any other disciplinary rule.

Upon receipt of the board's report and recommendation, Petitioner did not file objections because the findings and recommendations dealt only with the charges under Disciplinary Rules 1-102(A)(5) and 1-102(A)(6) and contained an acknowledgment that the charges stemming from all other disciplinary rules had been withdrawn by stipulation. Petitioner was therefore not afforded a hearing before the Supreme Court of Ohio.

The Supreme Court of Ohio thereupon effectively reinstated a charge against Petitioner of a violation of Disciplinary Rule 7-102(B)(1) which involved entirely different ethical considerations. The court's action, without notice to Petitioner and without any opportunity for presentation of a defense, resulted in the imposition of a penalty which was much more stringent than the penalty recommended by the Board of Commissioners. The court then denied Petitioner's motion for reconsideration which outlined the procedural irregularities. The net result to Petitioner was that he was never, at any stage of the proceedings, afforded a hearing on the issue of whether a violation of Disciplinary Rule 7-102(B)(1) had occurred.

Basic principles of due process guarantee that anyone faced with deprivation of liberty or property rights shall receive adequate notice of the charges against him and an opportunity to respond. Such principles apply in both criminal cases and in adversary proceedings of a quasi-criminal nature. In re Gault, 387 U.S. 1.

The federal courts have previously reversed disciplinary rulings against attorneys in a number of cases similar to the matter at bar. In In re Ruffalo, 390 U.S. 544 (1968), a grievance was filed against an attorney, charging that he was guilty of misconduct for, among other things, hiring a third party to solicit clients on his behalf. At the adjudicatory hearing, after the attorney and the third party had testified, an additional charge was levied against the attorney alleging that he was guilty of misconduct for hiring a third party to investigate legal claims, some of which involved the third party's regular employer. The attorney was disbarred based solely upon the supplemental charge, but the Supreme Court later held that the lack of notice to the attorney, prior to the time of his testimony and that of his witness, that employment of the third party would be considered a disbarment offense deprived the attorney of procedural due process. Id., syllabus.

Similarly, in Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169

(1971), an attorney was initially subjected to disbarment proceedings upon an allegation that he had misrepresented facts and failed to disclose information to a purchaser in a real estate transaction. Towards the end of the adjudicatory hearing and after the attorney and his primary witness had testified, an additional charge was levied against the attorney alleging misconduct toward the prospective real estate vendor. The attorney was disbarred based upon his conduct toward the vendor, but the Third Circuit Court of Appeals reversed the judgment of the district court, holding that due process required notice to the attorney of the exact nature of charges against him before commencement of disciplinary proceedings. Id., at 173.

In the case below, Petitioner received notice of all charges, but some of those charges were withdrawn prior to the commencement of the adjudicatory phase of the disciplinary proceeding. Petitioner was therefore deprived of actual notice of the pending charges against him and denied any opportunity to respond to those

charges. It is therefore respectfully submitted that Petitioner was denied procedural safeguards guaranteed him by the Fifth and Fourteenth Amendments and that his suspension from the practice of law may not stand.

Petitioner's continued capacity to function as an attorney at law has been gravely prejudiced by the decision of the Supreme Court of Ohio because his practice has been significantly interrupted and because the attendant adverse publicity will decrease public confidence in his skills and ethics. Furthermore, this matter, presents novel issues concerning procedural due process in grievance and disciplinary proceedings against attorneys which are of significant interest and concern to both the organized bar and to the general public. Petitioner therefore respectfully requests that this Honorable Court issue a Writ of Certiorari to the Ohio Supreme Court.

The suspension of an attorney from the practice of law based upon an interpretation of an ethical canon by the highest court of a state which differs significantly from interpretations of that canon applicable at the time of the occurrence of the alleged violation interferes with the attorney's right to due process.

Grievance and disciplinary proceedings against an attorney are adversary proceedings of a quasi-criminal nature. In re Ruffalo, 390 U.S. 544 (1968) at 551. The responding party in an adversary proceeding which is quasi-criminal in nature is entitled to due process of law. In re Gault, 387 U.S. 1 (1967). This Court has previously struck down a variety of state criminal statutes under the Due Process Clause in instances where the statutes were not sufficiently explicit to give fair warning of the conduct that constitutes a crime. See Bouie v. City of Columbia, 378 U.S. 347 (1964); Connally v. General Construction Company, 269 U.S. 385 (1926). One underlying principle of due process is that no person may be held criminally

responsible for conduct which that person could not reasonably understand to be proscribed. United States v. Harriss, 347 U.S. 612 (1954) at 617. When a statute either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, the first essential element of due process has been violated. Connally v. General Construction Company, 269 U.S. 385 (1926). An individual may not be required to speculate as to the meaning of penal statutes at the risk of liberty or property interests. Lanzetta v. New Jersey, 306 U.S. 451 (1939) at 453.

Although the Connally and Lanzetta cases dealt with state criminal statutes that were found to be unconstitutionally vague, the same principles proscribe judicial enlargement of statutes that are otherwise clearly drawn and concise. A deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and

precise statutory language. Bouie v. City of Columbia, 378 U.S. 347 (1964) at 352.

In the proceedings below, Petitioner was determined by the Supreme Court of Ohio to have violated Disciplinary Rule 7-102(B)(1) of the Code of Professional Responsibility as Adopted by the Supreme Court of Ohio, October 5, 1970. Based upon the finding of a violation, Petitioner was suspended from the practice of law for a six month period, thus depriving him of a protected property interest by affecting his capacity to earn a living. Disciplinary Rule 7-102(B)(1) provides that:

> "A lawyer who receives information clearly establishing that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal."

Disciplinary Rule 7-102(B)(1) thus appears to provide an Ohio attorney with guidance in governing his or her conduct when it is learned that a client has committed a fraud. Unfortunately, the rule is somewhat conflicting

with the well-established ethical canons concerning the protection of client confidences. Tension between the competing interests occurs when an attorney is asked to betray client confidentiality in order to report fraudulent behavior.

This ethical dilemma has resulted in considerable litigation in the State of Ohio and throughout the United States. The Supreme Court has not previously had occasion to offer guidance toward resolving the troublesome issue. However, the Ninth Circuit Court of Appeals has held that a criminal defendant's Sixth Amendment right to the effective assistance of counsel may limit the obligation of defense counsel to disclose perjury. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978).

In Ohio, the Disciplinary Rules themselves contain an inherent conflict. Disciplinary Rule 4-101 prohibits a lawyer from disclosing confidences or secrets acquired in the course of representation, with certain permissive exceptions, but no mandatory exceptions (Appendix

H). Ohio Ethical Canon 4-6 makes it clear that the obligation of a lawyer to preserve the confidences of his client continues after the termination of his employment. Thus, as in the case below, an attorney who learns of a potential fraud by a client, after representation of the client has concluded, is faced with conflicting ethical obligations. Ohio lawyers, as well as lawyers throughout the United States, have functioned with the conflicting duties since adoption of codes of professional responsibility.

On April 20, 1990, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio rendered an advisory opinion on the precise issue (Appendix I). The board advised the bar of Ohio in a published advisory opinion that a lawyer's duty of confidentiality under DR 4-101 outweighs his or her duty to rectify a fraud committed by a client under DR 7-102(A). The board further advised that an attorney should attempt to convince a client who offered fabricated evidence to reveal that fact to the affected tribunal and, if the client refuses to

do so, the lawyer should withdraw from representation. Petitioner and other Ohio attorneys accepted the board's opinion as confirmation of their personal interpretations of the conflicting ethical considerations.

In light of the rather confusing circumstances, Petitioner's conduct in 1985 which gave rise to the disciplinary charges against him appeared to be in line with his existing ethical obligations. When Petitioner learned that he had represented a client who had assumed a false identity and perpetrated a fraud upon a municipal court, he confronted the client and called upon him to correct the misrepresentation. Petitioner thereafter did not represent the client in any matter.

Two years later, the fraud was revealed to the court and in 1989, Petitioner was subjected to disciplinary proceedings. Disciplinary Counsel agreed to withdraw the charged violation of Disciplinary Rule 7-102(B)(1) apparently relying upon the advisory opinion of the Board of Commissioners on Grievances and Discipline. The

reviewing panel of the board assigned to Petitioner's case accepted the stipulated withdrawal of the charge and promised Petitoner that if the board determined that a violation of any other disciplinary rule had occurred that Petitioner would be given an opportunity to present additional evidence in defense. The Supreme Court of Ohio subsequently reinstituted the charge against Petitioner, without notice and without a hearing, and proceeded to expand upon the substance of the disciplinary rule. The court's decision to suspend Petitioner from the practice of law based upon his failure to report his client's fraud rendered the existing advisory opinion meaningless. The effect of the ruling was judicial enlargement of a penal rule.

Petitioner could not have been reasonably expected to know in 1985 that his conduct was proscribed or even inappropriate. He was deprived of his property interest in earning a living as a result. Petitioner therefore respectfully submits that the judgment of the Supreme Court of Ohio was rendered without consideration of

Petitioner's right to due process of law. Because this issue is of grave importance to both the practicing bar and to the general public, this Honorable Court should issue a Writ of Certiorari to the Supreme Court of Ohio.

CONCLUSION

For the foregoing reasons, Petitioner Edward A. Heffernan, an attorney at law, previously licensed to practice in the State of Ohio and in various federal courts, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Ohio entered on April 3, 1991.

Respectfully submitted,

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PROOF OF SERVICE

Service of process, pursuant to Rule 28.4(a) of the Supreme Court of the United States was effected by serving three revised copies of the foregoing Petitioner for Writ of Certiorari to the Supreme Court of Ohio on counsel for the Respondent by regular United States mail, on the 23rd day of July 1991, postage prepaid, addressed to: J. Warren Bettis, Esq., Office of Disciplinary Counsel, 175 South Third Street, Suuite 280, Columbus, Ohio 43215.

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APPENDIX A

SUPREME COURT, JANUARY TERM, 1991 [58 Ohio St. 3d]

Statement of the Case

OFFICE Of DISCIPLINARY COUNSEL v. HEFFERNAN.

[Cite as Disciplinary Counsel vs. Heffernan (1991), 58 Ohio St. 3d 260.]

Attorneys at law—Misconduct—Six-month suspension—Conviction for indirect contempt of court—Duty to reveal fraud upon the court—DR 7-102(B)(I).

(No. 90-2090—Submitted November 28, 1990—Decided April 3, 1991.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, No. 89-14.

Respondent, Edward A. Heffernan, was retained to represent Joseph Fresenda in a traffic case on a charge of having driven left of center. Respondent appeared in Shaker Heights Municipal Court on February 4, 1985 and pled no contest to the charge on behalf of Fresenda. Fresenda was found guilty and fined $50.

On April 14, 1987, Joseph Fresenda made a motion to withdraw the no contest plea and vacate the finding of guilt based on the fact that it was actually his brother Phillip Fresenda who was cited and found guilty of the traffic offense and that Phillip had held himself out to be Joseph to the citing officer and the municipal court. At a hearing on the motion, Joseph Fresenda informed the court that respondent had encouraged Phillip Fresenda to assume his brother Joseph's identity. Subsequently, respondent was charged with and convicted of indirect contempt of court. On appeal, respondent's conviction was affirmed. See Shaker Hts. v. Heffernan (1989), 48 Ohio App. 3d 307, 549 N.E . 2d 1231.

On April 21,1989, relator, Disciplinary Counsel, filed a complaint against respondent alleging seven violations of the Code of Professional Responsibility, including violations of DR 1-102 (A)(5) (conduct prejudicial to the administration of justice), 1-102(A)(6) (conduct adversely reflecting on one's fitness to practice law), and 7-102(B)(I) (duty to reveal a client's fraud perpetrated on a tribunal in the course of representation). Respondent denied any violations of the Disciplinary Rules in his answer. Subsequently, respondent and relator stipulated certain facts. A hearing was held before a

panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court on May 18, 1990. Respondent testified that he was unaware of the identity problem with his client until a few months after the court hearing, but admitted not informing the court of his discovery at that time.

The panel attempted to determine the credibility of the respondent and the Fresenda brothers by reviewing the evidence before it, and found the following facts: (l) Phillip Fresenda lied about his identity initially, by presenting his brother Joseph's driver's license and Social Security number to the citing officer; (2) Phillip had previously held himself out to be his brother; (3) Joseph had appeared in a criminal case in which Phillip was a defendant and had testified that he committed the acts of which Phillip was accused; and (4) both brothers have criminal records. Based on this evidence, the panel concluded that respondent did not knowingly deceive the Shaker Heights Municipal Court. The panel also concluded that once respondent discovered the identity deception he confronted the brothers, but did not notify the court of the fraud. The panel acknowledged respondent's admission to violations of DR 1-102(A)(5) and 1-102(A)(6) regarding this conduct, and recommended that respondent be publicly reprimanded. The sanction of public reprimand was based on the favorable character evidence introduced by respondent's professional peers and the personal repercussions respondent had already experienced as a result of the court conviction and disciplinary action.

The board adopted the findings of fact and recommendation of the panel and further recommended that costs of the disciplinary proceeding be taxed to the respondent.

J. Warren Bettis, disciplinary counsel, and Charles T. Brown, for relator.

Charles W. Kettlewell, for respondent.

Per Curiam. We accept the findings of the board that respondent did not know of the fraud perpetrated on the court at the time of the trial in the Shaker Heights Municipal Court. However, once respondent learned of the fraud and confronted the Fresenda brothers, he had a duty to reveal the fraud to the court. See DR 7-102(B)(l). We consider respondent's inaction in this matter a serious breach of duty for which a public reprimand is not an

adequate sanction.

Accordingly, we hereby suspend respondent from the practice of law in Ohio for six months. Costs taxed to respondent.

Judgement accordingly.

MOYER, C.J., SWEENEY, HOLMES, WRIGHT and RESNICK, JJ., concur.

DOUGLAS and H. BROWN, JJ., dissent.

DOUGLAS, J., dissenting. I concur in the recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court, and I would issue a public reprimand of respondent.

H. BROWN, J., concurs in the foregoing dissenting opinion.

APPENDIX B

The Supreme Court of Ohio
1991 TERM

Disciplinary Counsel,

Relator,

Edward A. Heffernan, Respondent.

To Wit: April 3, 1991

: ON CERTIFIED REPORT BY THE BOARD
: OF COMMISSIONERS ON GRIEVANCES AND
: DISCIPLINE OF THE SUPREME COURT

90-2090

ORDER

The Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on October 26, 1990, recommending that the respondent, Edward A. Heffernan, be publicly reprimanded pursuant to Rule V, Section 7(e) of the Supreme Court Rules for the Government of the Bar of Ohio. Respondent filed no objections to said Final Report, and this cause was considered by the Court. On consideration thereof,

IT IS ORDERED AND ADJUDGED by this Court that respondent, Edward A. Heffernan, be suspended from the practice of law for a period of six (6) months pursuant to Gov. Bar R. V, Sec. 7(c), consistent with the opinion rendered herein.

IT IS FURTHER ORDERED that the respondent, Edward A. Heffernan, cease and desist from the practice of law in any form and is hereby forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority.

IT IS FURTHER ORDERED that respondent is forbidden to counsel or advise or prepare legal instruments for others or in any manner perform such services.

IT IS FURTHER ORDERED that respondent is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

IT IS FURTHER ORDERED that respondent surrender his certifi-

cate of admission to practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

IT IS FURTHER ORDERED that respondent be taxed the costs of these proceedings in the amount of Nine Hundred Thirty-Nine Dollars and Ninety-Three Cents ($939.93), which costs shall be payable to this Court by certified check or money order on or before May 3, 1991.

IT IS FURTHER ORDERED that, pursuant to Gov. Bar R. X, Sec. 3(F), respondent shall complete one credit hour of continuing legal education for each month, or portion of a month of the suspension.

IT IS FURTHER ORDERED that respondent shall not be reinstated to the practice of law in Ohio until respondent complies with the requirements for reinstatement set forth in the Supreme Court Rules for the Government of the Bar and this Court orders respondent reinstated.

IT IS FURTHER ORDERED that on or before May 3, 1991, respondent shall:

1. Notify all clients being represented in pending matters and any co-counsel of his suspension and his consequent disqualification to act as an attorney after the effective date of this order and, in the absence of co-counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his place;

2. Regardless of any fees or expenses due respondent, deliver to all clients being represented in pending matters any papers or other property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

3. Refund any part of any fees or expenses paid in advance that are unearned or not paid, and account for any trust money or property in the possession or control of respondent;

4. Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of his disqualification to act as an attorney after the effective date of this order, and file a notice of disqualification of respondent with the court or agency before which the litigation is pending for inclusion in the respective file or

files;

5. Send all notices required by this order by certified mail with a return address where communications may thereafter be directed to respondent;

6. File with the Clerk of this Court and the Disciplinary Counsel of the Supreme Court an affidavit showing compliance with this order, showing proof of service of notices required herein, and setting forth the address where the affiant may receive communications; and

7. Retain and maintain a record of the various steps taken by respondent pursuant to this order.

IT IS FURTHER ORDERED that respondent surrender his attorney registration card for the 1989-1991 biennium forthwith.

IT IS FURTHER ORDERED that respondent shall keep the Clerk and the Disciplinary Counsel advised of any change of address where respondent may receive communications.

IT IS FURTHER ORDERED that the Clerk of this Court issue certified copies of this order as provided for in Gov. Bar R. V, Sec. 22.

THOMAS J. MOYER

Chief Justice

I HEREBY CERTIFY that this document is a true and accurate copy of the entry of the Supreme Court of Ohio dated April 3, 1991 in Supreme Court case number 90-2090.

In witness whereof I have hereunto subscribed my name and affixed the seal of the Supreme Court of Ohio on this 3rd day of April, 1991.

Marcia J. Mengel, Clerk

APPENDIX C

The Supreme Court of Ohio

1991 TERM

Disciplinary Counsel,

Relator,

v.

Edward A. Heffernan,

Respondent.

To wit: April 25, 1991

Case No. 90-2090

Entry

This cause came on for further consideration upon respondent's motions for rehearing and for stay. Upon consideration thereof,

IT IS ORDERED by the Court that said motions be, and the same are hereby, denied.

THOMAS J. MOYER

Chief Justice

APPENDIX D

DR 1-101 MAINTAINING INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further that application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102 MISCONDUCT:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103 DISCLOSURE OF INFORMATION TO AUTHORITIES.

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

(C) Any knowledge obtained by a member of a committee or subcommittee of a bar association designed to assist lawyers with substance-abuse problems shall be privileged for all purposes under DR 1-103, provided such knowledge was obtained while

such member was performing duties as a member of such committee or subcommittee.

(Amended, eff 6-17-87)

APPENDIX E

THE BOARD OF COMMISSIONERS
ON
GRIEVANCE AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re: CASE NO. 89-14
Complaint against:
Edward A. Heffernan,
Atty. Reg. #0000421
RESPONDENT,
Disciplinary Counsel,
RELATOR.

:FINDINGS OF
:FACT,
:CONCLUSIONS OF LAW, AND
:RECOMMENDATION OF THE
:BOARD OF COMMISSIONERS ON
:GRIEVANCES AND DISCIPLINE OF
:THE SUPREME COURT OF OHIO

A hearing was held in this matter on May 18, 1990 in the office of the Cleveland Bar Association, 113 St. Clair Avenue NE, Cleveland, Ohio 44114-1253. The Respondent, EDWARD A. HEFFERNAN, was present throughout the proceedings and was represented by Charles W. Kettlewell, Attorney at Law, 150 East Wilson Bridge Road, Suite 200, Columbus, Ohio 43085. The Relator is the Office of Disciplinary Counsel and was represented at the hearing by Hon. J. Warren Bettis and Charles T. Brown, Attorney at Law, 101 St. Clair NW, Standard Building, Cleveland, Ohio 44113.

The Hearing Panel consisted of the Hon. Judith A. Lanzinger, Nils P. Johnson, Jr. and Thomas G. Knoll, who served as Chairman. Pursuant to Gov. Rule V, Section (13), no member of the Panel was a resident of the district from which the Complaint originated, nor was any member of the Panel a member of the Probable Cause Panel which reviewed the matter pursuant to Section (10)(b) of Gov. Rule V.

The Complaint in this matter was filed with the Board of Commissioners on Grievances and Discipline on April 21, 1989. In response to the Complaint, the Respondent on May 4, 1989 filed a

Motion to Stay the Proceedings pending the outcome of his appeal to the Ohio Supreme Court of a finding of guilty of indirect contempt of the Municipal Court of Shaker Heights, Ohio. Said Motion was granted by Entry dated June 6, 1989. Subsequent to the filing of his Motion, Respondent retained the services of Mr. Kettlewell who filed an Answer to the Complaint on January 8, 1990.

At the time of the hearing, counsel for Respondent and counsel for Relator presented a document entitled "Stipulations-Admissions-and Recommended Sanction," which document, with attached Exhibits, sets forth the stipulations of the parties to certain facts in this matter, admits that Respondent has violated DR 1-102(A)(S) and DR 1-102(A)(6), withdraws all allegations as to violations of other disciplinary rules contained in the Complaint, and sets forth an agreed recommendation of sanction.

FINDINGS OF FACT

On the basis of the stipulations and testimony presented at the hearing, the Board finds as follows:

1. Respondent, EDWARD A. HEFFERNAN, is 41 years of age. His undergraduate degree in Political Science was obtained from John Carroll University in Cleveland, Ohio in 1971 after which he worked as a teacher and in educational administration. Respondent obtained his Juris Doctorate in 1977 from the Cleveland Marshall School of Law, having attended night classes at that institution since 1974. Upon his admission to the practice of law in February 1978, Respondent briefly continued his teaching activities, but also embarked upon a professional practice. From 1978 until 1980, Respondent was employed by the Cuyahoga County Prosecutor's Office, a position he left in 1980 to pursue private practice full-time. During his professional career, Respondent has been a lecturer at public schools and has also acted as a mock trial judge in connection with area high school judicial education programs. He has received certificates from the Cuyahoga County Office of Legal Aid and the Cleveland Board of Education for his activities on their behalf.

2. On December 11, 1987, Respondent was found guilty of one (I) count of indirect contempt for conduct related to Respondent's appearance on behalf of Phillip Fresenda on a traffic citation in the Shaker Heights Municipal Court. It was later learned that Phillip Fresenda had impersonated his brother, Joseph, at the time he

received the traffic citation and at the time of his subsequent appearance with Respondent in traffic court.

3. Sometime later, Joseph Fresenda learned of the deceit perpetrated by his brother Phillip and took action in the Shaker Heights Municipal Court to correct the citation against him. At that time, Phillip, by Affidavit and otherwise, affirmed to the Court that he had deceived the Court by pretending to be his brother, Joseph. Phillip further stated that even though it was he who initiated the deceit at the time of the accident, he continued the deceit at the traffic court appearance on the advice of Respondent, thereby implicating Respondent.

4. The testimony of Phillip and Joseph Fresenda at Respondent's contempt hearings directly contradicts the testimony of Respondent given at the contempt hearing and also in this testimony before the Board. The Fresenda brothers contend that Respondent knew at the time of Phillip's appearance on the traffic charge that he was impersonating his brother Joseph. Phillip Fresenda further states that Respondent advised him to continue the deception in order to avoid problems in connection with a separate automobile accident which Respondent was handling on Phillips's behalf.

Respondent has admitted that he, at the request of Mr. J. J. Fresenda, the father of Phillip and Joseph, made an appearance on behalf of Phillip in the Shaker Heights Municipal Court for purposes of entering a plea in the aforesaid traffic matter. Respondent stated that his time spent with Phillip on that occasion was very minimal and that he did not meet with Phillip until immediately before the hearing. He further stated that at no time prior to the traffic hearing had he any knowledge that there were, in fact, two (2) Fresenda brothers and had no reason to believe that Phillip and Joseph were not the same person. Respondent further testified that he had prior knowledge that Phillip, in fact, had used the name Joseph or a derivative thereof in connection with Phillip's jewelry business. Respondent acknowledged that he had prior contact with the Fresenda family, having appeared as defense counsel for Phillip Fresenda in another matter within the Cuyahoga County Court of Common Pleas, but he steadfastly maintained that he did not learn that there were two (2) Fresenda brothers until the summer of 1985, approximately five (5) or six (6) months after his appearance on behalf of said Phillip Fresenda in the

Shaker Heights Municipal Court. Further, Respondent denied that he ever advised Phillip or Joseph to do anything illegal or fraudulent in connection with Phillip's appearance before the Shaker Heights Municipal Court or otherwise.

In assessing the respective credibility attributable to the testimony of Respondent and the testimony of the Fresenda brothers, the Board did not have the benefit of personally viewing the testimony of the Fresenda brothers as given at the Respondent's contempt proceedings; however, the stipulations of Respondent and Relator, with the accompanying Exhibits, were very revealing in demonstrating that: (a) Phillip originated the deceit on the traffic charge and had his brother's driver's license and social security number at the time of the arrests (b) Phillip had on other occasions held himself out to be his brother, Joseph, by name and by social security number; (c) Both Phillip and Joseph were involved in a prior criminal matter in which Phillip was a defendant and in which Joseph appeared and testified that he, in fact, was the person who had committed the acts of which Phillip was accused; (d) Both Phillip and Joseph have been charged with criminal violations. Phillip's record includes seven (7) felony convictions. Joseph has been charged on two (2) separate occasions with felony violations, one of which was dismissed and the other having been reduced upon a misdemeanor plea. Based upon the foregoing, the Board resolved the questions of conflict in testimony with regard to Respondent's knowledge of the deception at the Shaker Heights Municipal Court traffic hearing and his counselling of Phillip Fresenda in favor of the Respondent.

At the time Respondent learned of the deception perpetrated by Phillip Fresenda, he immediately confronted Phillip and Joseph Fresenda concerning their conduct, but after such confrontation took no further action.

In the stipulations filed by Respondent and Relator, Respondent admits that his conduct in this matter set forth herein above was in violation of DR 1-102(A)(S) and DR 1-102(A)(6).

CONCLUSIONS OF LAW

The Board finds by clear and convincing evidence that Respondent has violated DR 1-102(A)(S) and Dr 1-102(A)(6).

The stipulations of Respondent and Relator recommend a public reprimand as a sanction in this matter. The Panel concurs in that

Recommendation.

In reaching its determination in this matter, the Board encountered some difficulty since it concluded Respondent did not knowingly perpetrate a deception on the Shaker Heights Municipal Court, despite that Court's decision in Respondent's contempt proceedings. However, notwithstanding counsel for Respondent's argument that Respondent's attorney/client relationship precluded him from acting differently when he discovered the deception, the Board concluded that such conduct fell below what was required in those circumstances. Finally, the Board could not overlook Respondent's own admission in the stipulation that his conduct violated DR 1-102(A)(S) and DR 1-102(A)(6).

In assessing the proper sanction, the Board considered that Respondent has already encountered significant punishment for his actions, having had to endure the embarrassment and distraction which were occasioned by the contempt proceedings and his appeal. The Board also noted the apparent respect with which the Respondent is held by others in the practice as evidenced by the personal testimony of members of the profession and the significant number of letters of recommendation presented at the hearing.

RECOMMENDATION

Pursuant to Gov Bar R V(18), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 12, 1990. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Edward A Heffernan, be publicly reprimanded. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

JONATHAN W. MARSHALL Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCE & DISCIPLINE
SUPREME COURT OP OHIO

IN RE: EDWARD A. HEFFERNAN,
Respondent,
and
OFFICE OF DISCIPLINARY COUNSEL,
Relator.
CASE NO. 89-14

STIPULATIONS-ADMISSION AND RECOMMENDED SANCTION

NOW COME Relator and Respondent who respectfully submit Stipulations, Admission, and Recommendation of Sanction as follows:

1. Relator and Respondent submit this pleading with exhibits fully identified in the attached "List of Exhibits".

2. On December 11, 1987 Respondent was found in contempt of (Exhibits 9-15) for conduct related to Respondent's appearance on behalf of Phillip Fresenda on a traffic charge (Exhibits 1-5 & 17) in which it was later learned that Phillip Fresenda had impersonated his brother, Joseph, at the time of an automobile accident (December 20, 1984), and at the time of his pleading no contest to the traffic charge (February 4, 1985).

3. Joseph Fresenda later (Summer 1985) learned of the deceit against him by his brother and took action in Court to correct the citation against him. (Exhibits 6-8 & 18). At that time his brother, Phillip Fresenda, by Affidavit (Exhibit 6) and otherwise, affirmed to the Court that he had deceived the Court by pretending to be his brother Joseph. Phillip went on to say that even though he had initiated the deceit at the time of the accident, he continues the deceit on the advice of counsel, thereby implicating respondent.

4. The credibility of Phillip and Joseph Fresenda is highly questionable:

a. Phillip originated the deceit on the traffic charge and has his brother's drivers license and social security number at the time of arrest; (Exhibit 6)

b. Phillip has on other occasions held himself out to be his brother Joseph "by name and by social security number"; (Exhibit 24)

c. Their involvement in criminal case number 216480, July 29, 1987, a case in which Phillip was the defendant and in which Joseph appeared and testified that he, in fact, was the person who had done the things that Phillip was accused of having done. (Exhibit 23)

d. Phillip and Joseph Fresenda have both been charged with criminal violations. Phillip's record includes the following felony convictions:

i) CR-165536 - concealed weapon;

ii) CR-169445 - tampering coin machine, possession of criminal tools;

iii) CR-171151 - grand theft

iv) CR-172569 - grand theft

v) CR-1933BS - grand theft

vi) CR-206523 - grand theft

vii) CR-206162 - grand theft

(Exhibits 20 & 22)

e. Joseph was charged on two occasions for felony violations. One was dismissed and the other was reduced to a plea to a misdemeanor. (Exhibits 19 & 21).

5. Respondent has admitted that he, at the request of Mr. J.J. Fresenda, the father of Phillip and Joseph, made an appearance on behalf of Phillip for purposes of entering a plea in the traffic case (Case No. 84-TRD-20663); that Respondent's time spent with Phillip on that occasion was very minimal; and that on the occasion of representing Phillip on the traffic charge in which Phillip impersonated his brother Joseph, Respondent did not see Phillip until immediately before the hearing and at that time had no knowledge that there were in fact two brothers and no reason to believe that Phillip was not the same as Joseph Fresenda.

6. Respondent acknowledges that he appeared as defense counsel for Phillip Fresenda in Cuyahoga Common Pleas Court, Case No. 193385, State of Ohio v. Phillip Fresenda. His initial appearance was on October 4, 1984. He appeared again on January 24, 1985 at the time of the plea. Finally he appeared on February 21, 1985 at the sentencing. (Exhibit 16).

7. Respondent has steadfastly maintained that:

a. He did not learn that there were two Fresenda brothers until the Summer of 1985;

b. He did not know that Phillip Fresenda was not Joseph Fresenda at the time of the hearing on the traffic charge, and that his contact with Phillip in Case No. 193385 had been minimal;

c. He did not know that Phillip Fresenda did not have automobile insurance at the time of the accident nor that Phillip was lying in that regard at the traffic case; and

d. He never advised Phillip or Joseph to do anything illegal or fraudulent.

8. Respondent continues to deny that he assisted Phillip Fresenda in perpetrating any fraud on the Court at any time.

9. Respondent acknowledges that the contempt judgment reflects adversely on him and the legal profession and, thus, on the administration of justice.

10. Respondent admits that his conduct violates DR 1-102(A)(5) and (A)(6).

11. Relator, in view of Board Opinion 90-07, withdraws all charges and allegations other than the charge of a violation of DR 1-102(A)(5) and (A)(6).

12. Relator and Respondent each recommend a public reprimand as the sanction in this case. Both Relator and Respondent understand that this recommendation is not binding upon the Panel, Board of Commissioners, nor the Supreme Court.

Respectfully Submitted,
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Respondent

BEST A

APPENDIX F

DR 7-102 REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW

(A) In his representation of a client, a lawyer shall not:

(l) File a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injury another.

(2) Knowingly advance a claim or defence that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

AILABLE COPY

APPENDIX G

The Supreme Court of Ohio
1991 TERM

Disciplinary Counsel,
Relator,
v.
Edward A. Heffernan,
Respondent.

To wit: April 25, 1991
Case No. 90-2090

Entry

This cause came on for further consideration upon respondent's motions for rehearing and for stay. Upon consideration thereof,

IT IS ORDERED by the Court that said motions be, and the same are hereby, denied.

THOMAS J. MOYER

Chief Justice

APPENDIX H

DR 4-101 PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4 101(C), a lawyer shall not knowingly

(I) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal

(I) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rule or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the Crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D).A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

APPENDIX I

The Supreme Court of Ohio
Board of Commissioners on Grievances and Discipline
41 South High Street – Suite 3370, Columbus, Ohio 43215-6104
(614) 644-5800
Office of Secretary

OPINION 90-07

Issued April 20, 1990

SYLLABUS: Confidential information obtained during an attorney-client relationship is privileged and may not be disclosed by the lawyer unless permitted under DR 4-101(C). A lawyer may not offer false evidence to any tribunal under DR 7-102(A). A lawyer should try to convince a client who offered fabricated evidence to reveal that fact to the affected tribunal. A lawyer's duty of confidentiality under DR 4-101 outweights his or her duty to rectify a fraud committed by a client under DR 7-102(A). If the client refuses to reveal the fraud the lawyer should withdraw from the representation under DR 2-110.

OPINION: We have before us your request regarding a client who offered fabricated records to an administrative agency investigating the client. The administrative agency is unaware that the records are fabricated and the fabrication was done without your knowledge. Your specific questions are: 1) if you agree to the representation must you reveal the fraudulent records and 2) if you decline the representation must you reveal the fraudulent records to the administrative agency?

Disciplinary Rule 7-102(A) (6) prohibits a lawyer from participating in the preservation of evidence the lawyer knows is false. A lawyer who presents evidence during an adversary hearing "in effect warrants that he or she does not know that the evidence is false." Wolfram, Modern Legal Ethics 641 (West, 1986), citing, DR 7-102 (A) (4). Therefore, if you accept the case you may not present the fraudulent records to the administrative agency.

A client who offers evidence the lawyer knows to be false creates a conflict between the lawyer's duty of confidentiality and the duty of candor to the tribunal. ABA Annotated Model Rules of Professional Conduct, 207 (1984). The lawyer must try to persuade the client not to offer the evidence or if it has been offered, to disclose it immediately. ABA Committee on Ethics and Professional Re-

sponsibility, Informal Op. 1470 (1981). If the client refuses to rectify the situation the lawyer should decline the representation or withdraw from the representation. Code of Professional Responsibility DR 2-110(B),(C) Disciplinary Rule 7-102(B)(1) requires a lawyer to reveal to the affected person or tribunal information clearly establishing that a client has perpetrated a fraud. A tribunal "includes all courts and all other administrative bodies." Code of Professional Responsibility, Definitions Section 6. The lawyer must promptly call upon the client to rectify the fraud and must reveal the fraud if the client refuses or is unable to do so. Code of Professional Responsibility, DR 7-102(B)(I). How is this duty to disclose affected by the attorney-client privilege?

Ohio has not adopted the ABA'S 1974 amendment to DR 7-102(B)(I) which prohibits the disclosure of the past fraud when the information is protected by the attorney-client privilege. "The confidential privilege... must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal." ABA Committee on Ethics and Professional Responsibility, Informal op. 1314 (1975).

We agree. Although this state does not have the exception in DR 7-102(B)(I), we believe that the rule only requires disclosure of a client's past fraud when such information is not protected against disclosure by the attorney-client privilege. Callan, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332, 361-362 (1976).

The attorney-client privilege set forth in DR 4-101 prohibits a lawyer from revealing the confidences or secrets of a client. lawyer may reveal confidences or secrets if the client consents after full disclosure or if permitted under the Disciplinary Rules. Code of Professional Responsibility, DR 4-101(C) (1),(2).

Critical to this request is whether an attorney-client relationship existed when the information about the fabricated records was revealed. If the attorney-client relationship did exist, then the duty of confidentiality supersedes the duty to disclose under DR 7-102(B)(1). Based solely on the facts in your letter, we believe an attorney-client relationship was established when the client disclosed the existence of the fraudulent records. The duty of confi-

dentiality can extend to a preliminary consultation even if employment does not arise. ABA/BNA Lawyers' Manual on Professional Conduct 31:101 (1989). Moreover, the duty of confidentiality continues even after the termination of the attorney-client relationship. Code of Professional Responsibility, EC 4-6.

However, the protection of the privilege does not apply if the client came to you seeking aid or assistance in committing a future crime or fraud. Callan, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in m, 29 Rutgers L. Rev. 332, 342 (1976). The protection of the privilege is unavailable when the client's purpose, at the time of the consultation, is to abuse or exploit the confidential relationship. Id.

In conclusion, it is our opinion that the information regarding the fraudulent records should be considered privileged and may not be divulged unless permitted under DR 4-101(C). A lawyer may not offer false evidence to any tribunal under DR 7-101(A)(4),(5),(6),(7). A lawyer must try to convince the client to reveal the fraudulent nature of the evidence to the administrative agency. If the client refuses, the lawyer should withdraw from the representation under DR 2-110.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.